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Simmons v. Arizona Public Service Co., 90-ERA-6 (Sec'y Sept. 7, 1994)
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DATE: September 7, 1994
CASE NO. 90-ERA-6

IN THE MATTER OF

WILLIAM DAVID SIMMONS,

COMPLAINANT,

v.

ARIZONA PUBLIC SERVICE CO.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER APPROVING SETTLEMENT AGREEMENT
AND DISMISSING CASE

Before me for review is the Recommended Decision and Order (R.D. and O.) issued January 9, 1990, by the Administrative Law Judge (ALJ) in the captioned case, which arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (1988).

The parties in this case have submitted a Settlement Agreement dated January 5, 1990, and the ALJ has recommended that their agreement, as modified to comply with the requirements of 29 C.F.R. § 18.9(b) (1993), be approved. In reviewing the case materials, I note that the settlement covers matters other than claims arising under the ERA and the SDWA. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2, I have limited my review of the parties' Settlement Agreement to determining whether it constitutes a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA and the SDWA. The Settlement Agreement has been reviewed, I find that it constitutes a fair, adequate and reasonable settlement of

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Complainant's claims under the above statutes, *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-1154 (5th Cir. 1991);

Thompson v. U.S. Department of Labor, 885 F.2d 551, 556 (9th Cir. 1989), and I approve it.

In so doing, I do not adopt the ALJ's recommendation that the parties' Settlement Agreement be modified to comply with the requirements of 29 C.F.R. § 18.9(b). Part 18, 29 C.F.R., sets forth the procedural rules for hearings before Labor Department ALJs. Section 18.9 contemplates two means of disposing of a case prior to hearing -- by (1) "a settlement" or (2) "an agreement containing findings and an order disposing of the whole or any part of the proceeding." 29 C.F.R. § 18.9(a). Subsection (b) of the regulation applies only to "[a]ny agreement containing consent findings and an order disposing of a proceeding or any part thereof," which presumably constitutes a variety of agreement under the second category listed in subsection (a). Under subsection (b), an "agreement containing consent findings and an order disposing of a proceeding or any part thereof" must provide:

(1) That the order shall have the same force and effect as an order made after full hearing; (2) That the entire record on which any order may be based shall consist solely of the complaint, order of reference or notice of administrative determination (or amended notice, if one is filed) as appropriate, and the agreement; (3) A waiver of any further procedural steps before the administrative law judge; and (4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

29 C.F.R. § 18.9(b). The distinction between "a settlement" and "an agreement containing findings" also appears at 29 C.F.R. § 18.9(c), which specifies that the parties may "submit the proposed agreement containing consent findings and an order for consideration by the [ALJ]" or "notify the [ALJ] that the parties have reached a full settlement and have agreed to dismissal of the action" or "inform the [ALJ] that agreement cannot be reached."

I note that, as a general proposition, "[a] consent judgment is a compromise between two parties . . . fixed by negotiation . . . and formalized by the signature of a . . . judge." *Adams v. Bell*, 711 F.2d 161, 195 n.123 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984). Consent judgments may or may not admit wrongdoing or incorporate consent findings, *i.e.*, stipulated

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factual findings upon which legal conclusions may be based. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-239 (1975); *In Re Halpern*, 810 F.2d 1061, 1064-1065 (11th Cir. 1987).

In Re Halpern offers an example of such consent findings. There, a bankruptcy court concluded that Halpern, the debtor, was collaterally estopped from relitigating factual findings contained in a State court consent judgment entered into by the plaintiff banking institution and defendant Halpern. (The

State court complaint alleged that Halpern had engaged in a check kiting scheme to defraud the bank. The issue in the bankruptcy proceeding was whether Halpern's debt to the bank was nondischargeable because it was incurred by fraud.) The consent judgment included the following findings: "that Halpern made material misrepresentations of fact to [the bank]; that Halpern knew the statements were false at the time they were made; and that Halpern made the misrepresentations with the intent to induce reliance by [the bank] in extending cash, bank obligations and deposit credits to Halpern." 810 F.2d at 1062. In addition, "Halpern admitted that this conduct was 'wilful, malicious, and intentional and designed solely for the purpose of fraudulently deceiving [the bank].'" *Id.*

An examination of the instant parties' January 5 Settlement Agreement reveals a general absence of stipulated factual findings to support legal conclusions relevant to the issues in the case. While agreeing to relinquish certain rights in order to gain certain benefits, the parties expressly intended that their settlement "shall not be construed as an admission of any wrongdoing by any of the parties, nor shall it be construed as an adjudication on the merits for or against either party." Agreement, paragraph 3. The Settlement Agreement otherwise provides that Complainant voluntarily withdraws his complaints and agrees not to file further claims against Respondent under the employee protection provisions of the ERA and the SDWA regarding preceding events; that Complainant is not precluded from reporting safety concerns to government agencies; that Complainant agrees to make up all deficient training courses; that Respondent agrees not to retaliate against Complainant because he filed the instant discrimination proceeding; and that Respondent will take certain actions and make certain payments to compensate for Complainant's discharge and to reimburse Complainant for costs and expenses, including attorney fees. The sole provision even remotely resembling a factual finding appears in paragraph five where the parties "acknowledge" that Complainant was rehired shortly after the Assistant Secretary for Employment Standards issued his investigation findings. This stipulation, however, does not bear on the issue of Respondent's

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liability.

Since the parties' Settlement Agreement resembles a standard "settlement" under the first category listed in 29 C.F.R. § 18.9(a), rather than an "agreement containing consent findings" subject to subsection (b) of the regulation, modification of the agreement appears unnecessary. Accordingly, the parties' January 5, 1990, Settlement Agreement is approved, and the complaint in this case is dismissed.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

